IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

DORIAN ROMERO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

DCA CASE NO: 5D14-1709
L.T. CASE NOS.: 2008-CF-8896-B
2008-CF-8898-B
2008-CF-8899-A
2008-CF-8902-A
2008-CF-9669-B
2008-CF-9655-A

INITIAL BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT,
ORANGE COUNTY, FLORIDA, OF A DENIAL OF
THREE MOTIONS FOR POSTCONVICTION RELIEF

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I. STATEMENT OF THE CASE AND FACTS

This is an appeal of the Circuit Court's Orders entered April 10, 2014, wherein the Circuit Court summarily denied three motions for postconviction relief filed separately in six juvenile-to-circuit criminal cases. In these cases, fourteen-year-old Dorian Romero ("Dorian") was direct filed and sentenced as an adult. Dorian completed his sentence on October 23, 2011.

A. Statement of Facts

In 2008, fourteen-year-old Dorian was arrested repeatedly over a short period of time: between January 9, 2008 and May 15, 2008, Dorian Romero was the target of seven separate juvenile cases based on three groups of incidents. The last five cases all occurred on May 15, 2008. Ironically, on May 6, 2008 Dorian had been ordered into the custody of the Department of Juvenile Justice ("DJJ") pursuant to revocation of withheld adjudication in case 2008-CJ-1244, but released because no room was available at DJJ's Falkenburg Academy facility.

After the May 15, 2008 incidents, the prosecutor transferred Dorian's pending cases to the Circuit Court. Section 985.556(4)(e), Florida Stat., provides that "Any decision to transfer a child for criminal prosecution must be in writing and include consideration of, and findings of fact with respect to, all criteria in paragraph (c). The court shall render an order including a specific finding of fact

and the reasons for a decision to impose adult sanctions." Nevertheless, the Court did not make written findings as to each factor in its order transferring jurisdiction. Additionally, Section 985.556(4)(d), Florida Stat., requires that a DJJ agent submit a written report on the eight factors, and the child and his parents or guardians shall have the right to examine the report and question the party who prepared it. No such report was filed. Finally, Subsection (4)(a) requires the prosecutor to obtain and consider the recommendation of the juvenile probation officer before filing any motion to transfer. The prosecutor did not do so. (R. 41-42).

Nevertheless, the juvenile court waived its jurisdiction. Ultimately Dorian entered a plea that called for sentencing under the Youthful Offender Act. Counsel had explained that Dorian would serve a few months, then transfer to basic training as part of the shock incarceration program and be released on early probation. Counsel did not inform Dorian that, in order to receive the benefit of the basic training program, first DOC would have to recommend him and only if the judge failed to deny the recommendation in 21 days would Dorian enter basic training. (R. 42-43). Counsel also failed to inform Dorian that, as a discretionary transferee under Section 985.565(4)(b), he was eligible for sentencing as a juvenile if he rejected the plea offer. (R. 43). Counsel did not explain that Dorian could appeal his transfer to circuit court, or that any grounds for appeal existed. (R. 44).

On December 11, 2008, the Court sentenced Dorian to serve 30 months in the DOC. Memorializing the importance of shock probation in Dorian's acceptance of the plea, the sentencing judge even recorded on the judgment that Dorian would be "screened for basic training," although this screening is automatic under Florida law. Dorian thought that he was guaranteed basic training if the DOC found him eligible. (R. 43). No presentence report was prepared, in violation of Rule 3.710(a) of the Florida Rules of Criminal Procedure, which requires a presentence report unless the court imposes a sentence of probation. (R. 43-44). Dorian's counsel did not consult with him on appealing his sentence.

Court records show that on April 29, 2009 the court docketed an order denying basic training for Dorian. The correspondence docketed with the order shows that, on February 23, 2009, DOC sent the sentencing judge a letter explaining that Dorian was eligible for basic training placement, and would automatically enter basic training unless the judge ordered otherwise with 21 days. In this case the judge – a new judge, who had not previously made a ruling in Dorian's case – denied the basic training recommendation without entering a single word of explanation. Although Dorian should have automatically been placed in basic training when the court failed to respond by March 16, 2009, the DOC relied on the untimely denial of its recommendation to exclude Dorian from the shock

incarceration program. Counsel never informed Dorian that his right to basic training has already accrued, and that he should have been placed in the basic training program. (R. 44).

B. Procedural History of the Orders Appealed

On September 18, 2013, Dorian filed his "Motion for Relief Pursuant to Rules 3.800 and 3.850 of the Florida Rules of Criminal Procedure, or in the Alternative for Relief Pursuant to a Petition for a Writ of Error Coram Nobis or a Writ of Habeas Corpus." (R. 2-14). On December 11, 2013, the Circuit Court dismissed that motion, and ordered Dorian to refile three separate motions corresponding to the three procedural vehicles Dorian invoked. (R. 15-16). On February 10, 2014, three separate motions were filed. (R. 23-48).

In the refiled Rule 3.800 motion, Dorian argued that his sentence of incarceration in a Department of Corrections ("DOC") facility was illegal because: the State did not obtain a recommendation from the juvenile probation officer with respect to direct filing all of the charges; the DJJ failed to submit a written report describing how the statutory factors governing transfer in Section 985.556(4)(d), Fla. Stat., applied to his case; the court's transfer order did not address the eight statutory factors; the Circuit Court failed to obtain a presentence report before sentencing Dorian to a term of incarceration; and, Dorian should have been

automatically transferred to the basic training program when the deadline for denying transfer elapsed. (R. 27).

In his refiled Rule 3.850 motion, Dorian raised grounds from the Rule 3.800 motion, contending that his conviction and/or sentence were invalid because: the prosecutor should have obtained DJJ's with respect to direct filing; the DJJ failed to submit the required written report to the juvenile court; the juvenile court's transfer order did not address each of the Section 985.556(4)(d) criteria; and, the Circuit Court should have ordered a presentence report. (R. 45).

Additionally, in the refiled Rule 3.850 motion, Dorian argued that his counsel rendered ineffective assistance under Strickland and Hill[1] by: failing to inform him that basic training was not automatic; failing to inform him that the court had discretion to sentence him as a juvenile; and, failing to inform Dorian that he could appeal. (R. 45-46). Finally, Dorian contended that counsel's mistakes rendered his plea involuntary, and that the plea agreement was violated when the court denied without explanation the DOC's recommendation that Dorian enter the basic training program. (R. 46).

1 Strickland v. Washington, 466 U.S. 668 (1984); Hill v. Lockhart, 474 U.S. 52 (1985).

Dorian acknowledged that his petition was filed more than two years after his conviction became final, but requested that the limitations period be tolled until the date of his eighteenth birthday:

> Florida courts recognize other exceptions [to the limitations period] when justice requires. For example, in Demps v. State, the Third District Court of Appeals held that, in order to preserve the right of access to the courts, the two-year limitations period is tolled while an inmate is confined without access to Florida legal materials. 696 So. 2d 1296, 1297 (Fla. 3d DCA 1997). Mr. Romero asks this Court to toll the limitations period to challenge these convictions until the day he turned eighteen – September 22, 2011. With this tolling, Mr. Romero's motion would be timely as to all of his claims.

(R. 40).

In his petition for a writ of habeas corpus, Dorian raised the same claims as his Rule 3.850 motion. (R. 36-38). Dorian argued that his claims were cognizable in habeas if the Rule 3.850 limitations period could not be extended until Dorian turned eighteen, because Rule 3.850 would then be inadequate to test his convictions. (R. 29). Dorian also argued that his claims rose to the level of a manifest injustice due to the Circuit Court's jurisdiction-divesting procedural errors, and because of the general importance of ensuring that courts comply with the procedures whereby a fourteen-year-old offender is transferred to circuit court and faces the stigma of an adult conviction. (R. 30-32).

On April 10, 2014, the Circuit Court filed three orders denying the motions for postconviction relief. (R. 51-75). Insofar as Dorian's claims were brought under Rule 3.850, the motion was untimely, and sought to raise claims that should have been brought on direct appeal. (R. 63-64). Dorian's claims that counsel did not inform him of his right to appeal should have been raised in the District Court, because the Circuit Court could not grant a belated appeal. (R. 64). Dorian's final 3.850 claim that he should automatically have been placed in the basic training program "is a matter that should have been raised through grievance procedures within the department of corrections." (R. 64-65).

Dorian's habeas claims were not cognizable because they should have been filed in Liberty County, where Dorian was transferred after the motion was filed; additionally, they could have been raised at trial or on appeal. (R. 74). Finally, Dorian's sentencing claims were not cognizable in Rule 3.800 because the sentence was not "illegal" for the purposes of that rule. (R. 52-53).

Dorian now files this timely appeal. Dorian's case presents the following issues:

1) whether the Circuit Court should have excused Dorian's failure to comply with Rule 3.850's two-year limitations period;

2) whether Dorian's claims are cognizable under Rule 3.850 even though Dorian failed to raise them before or during direct appeal;

3) whether Dorian must attempt to use Rule 9.141(c) (petition for belated appeal) to bring his claim that trial counsel rendered ineffective assistance by failing to consult with Dorian about an appeal;

4) whether the basic training issues are barred because Dorian did not raise the issue with the Department of Corrections during his incarceration;

5) whether Dorian has pleaded a "manifest injustice" that warrants relief in habeas corpus despite his failure to raise the issues at trial or on appeal;

6) whether Dorian's habeas petition should be dismissed because he is no longer incarcerated in Orange County; and,

7) whether Rule 3.800 provides a remedy for the claims that Dorian raises.

In the spirit of candor to the Court, Dorian points out that his custody status.

II. SUMMARY OF ARGUMENT

The Circuit Court summarily denied Dorian's motions without a hearing, relying on procedural grounds. A summary denial is not appropriate unless the record conclusively demonstrates that Dorian is not entitled to relief. Dorian's appeal therefore turns on whether the record attached by the Circuit Court conclusively demonstrates that Dorian's claims are procedurally barred or that, if proven, they would not demonstrate grounds for relief.

Dorian has obviously failed to comply with the letter of Rule 3.850's two-year limitations period. Nevertheless, the Circuit Court erred by failing to consider whether the limitations period should be tolled because of Dorian's youth, either as a matter of law due to his nonage or due to Dorian's unique characteristics including youth.

The Circuit Court also erred by concluding that the claims were not cognizable because they could have been raised at trial, on direct appeal, or through the DOC grievance process. Dorian claims that his trial counsel rendered ineffective assistance by, *inter alia*, failing to advise him as to his right to withdraw his plea and to appeal that denial if necessary. The Circuit Court should not have applied a procedural bar to claims that were not raised earlier due to counsel's ineffective assistance. Additionally, Dorian's right to seek a belated appeal had

expired at the time his initial motion was filed because Rule 9.141(c) creates a limitations period that cannot be tolled beyond four years. As for the Dorian's claim that he should have been placed in basic training because the 21-day denial period elapsed without action by the Circuit Court, the same factors that support tolling the Rule 3.850 limitations period weigh against requiring exhaustion during Dorian's incarceration. Moreover, exhaustion would have been futile because DOC has promulgated regulations that do not incorporate the 21-day denial period; instead, the DOC's regulations require affirmative action by the sentencing court before basic training placement, in violation of the clear text of the statute. Finally, DOC did not act alone; the Circuit Court lended its imprimatur to the illegal sentencing that occurred in this case. Under these circumstances, Dorian should not be punished for failure to bring his claims earlier. The Circuit Court erred by ruling that Dorian's claims were not cognizable because they could have been brought in earlier proceedings.

Dorian further contends that his claims are also cognizable in a petition for a writ of habeas corpus, and that the Circuit Court erred by holding that Dorian's failure to raise his claims at trial or on direct appeal renders further review impossible. The Circuit Court also erred by holding that Dorian's habeas petition was improperly filed because Dorian was subsequently transferred.

Finally, Dorian contends that the Circuit Court erred in holding that none of Dorian's sentencing claims were cognizable in a Rule 3.800 motion. Relief under Rule 3.800 is appropriate where an error is apparent from the face of the record, and not limited to sentences that exceed the statutory maximum.

III. ARGUMENT

A. The two-year limitations period for challenging Dorian's juvenile convictions should be tolled at least until Dorian turned 18.

Rule 3.850's limitations period should not be interpreted to require the virtually impossible. To train an attorney requires seven years of postsecondary education. One should not expect uncounselled juvenile offenders to acquire the cognitive skills necessary to identify and synthesize the law and apply it to their own case. This flies in the face of common experience and a body of case law recognizing that minors deserve special protection of their legal rights.

Additionally, juveniles are less able to appreciate that attempting to learn about their case is in their own best interests, and accordingly less apt to display the discipline necessary for a serious attempt. Incarcerated juveniles also face a uniquely maladapted peer group, detracting from their ability to comply with the typical expectations of an incarcerated defendant. As law from other contexts demonstrates, our society protects youth from a perceived lack of wisdom by forbidding minors from engaging in vices, by providing additional procedural protections or the appointment of a guardian for legal matters, and by requiring that important decisions (such as for whom to vote, or whether to enter a contract) be deferred until the age of majority. It is not consistent with our shared values to hold a fourteen-year-old responsible for challenges to criminal conviction when we

consider even a seventeen-year-old too immature and unwise to buy a lottery ticket, vote, or enter a contract.

Fortunately, Rule 3.850 does not require this draconian result. Rule 3.850 was created by the judiciary, not the legislature, so no separation-of-power issue requires courts to hew closely to the text as the best indicator of congress's intent. Jones v. Fla. Parole Comm'n, 48 So. 3d 704, 707 (Fla. 2010) (citation omitted). With regards to the Rule 3.850 limitations period, "matters of practical judgment and empirical calculation" are for the judiciary to decide. See State v. J.P., 907 So. 2d 1101, 1136 (Fla. 2004) (describing more common scenario where such matters are left to the legislature). The courts have authority to interpret Rule 3.850 to do substantial justice. Steele v. Kehoe, 747 So. 2d 931, 934 (Fla. 1999) (citation omitted) (explaining that procedural bars in postconviction cases "are subject to the more flexible standards of due process"). Lower courts can create exceptions to the limitations period which are not yet enumerated in the rule. Demps v. State, 696 So. 2d 1296 (Fla. 3d DCA 1997) (tolling the limitations period during period inmate lacked access to Florida legal materials).

Here, Dorian asks the Court to exercise its discretion to toll the limitations period until age eighteen for Dorian and all other similarly situated minors. Both legislatures and common-law courts recognize that minors categorically should be

treated differently due to qualitative differences between adolescence and adulthood. Moreover, Florida has articulated a clear preference for statewide uniformity in treatment of minors. The Florida Constitution expresses a clear preference for statewide uniformity by forbidding any local law pertaining to "relief of minors from legal disabilities." Fla. Const. Art. III, § 11. The Court should read Rule 3.850's limitations period to include a tolling provision for all minors because it is good policy that comports with society's expectations of minors, and would create a clear and easy-to-administer rule.

Additionally, failure to toll the limitations period until age 18 could raise a constitutional issue that would more prudently be avoided by deciding as a matter of policy that Rule 3.850 includes a tolling provision for minors. State v. Mozo, 655 So. 2d 1115, 1117 (Fla. 1995) (discussing "settled principle" that courts should avoid constitutional issues if not necessary to decide case).

Finally, Dorian argues that his motion should be considered timely due to his specific circumstances, including youth. Rule 3.050 of the Florida Rules of Criminal Procedure authorizes the courts to grant extensions on a case-by-case basis. Dorian submits that his youth, personal characteristics, and incarceration warrant tolling the limitations period at least until Dorian turned 18. The district court erred by denying the motion without further factual development.

1. The limitations period should be tolled for Dorian and all other similarly situated juveniles.

Jurists have repeatedly remarked on the special place of youth in American jurisprudence, relying on nothing more than shared experience and common sense. "Youth is more than a chronological fact. It is a time and condition of life." Roper v. Simmons, 543 U.S. 551, 569 (2005) (holding that the federal constitution prohibits the execution of a minor). "Even the normal 16-year-old customarily lacks the maturity of an adult." Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (holding that youth is a mitigating factor in capital cases). "[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." May v. Anderson, 345 U.S. 528, 536 (1953) (limiting application of Full Faith and Credit Clause; refusing to enforce out-of-state custody decree issued without personal jurisdiction) (Frankfurter, J., concurring). Courts and legislatures both act "on the basis of the qualitative differences in maturity between children and adults . . . and not without reason." Hodgson v. Minn., 497 U.S. 417, 482-83 (1990) (overturning two-parent abortion consent law).

These characteristics of childhood and adolescence are recognized to apply broadly to all men and women. "[T]he legal disqualifications placed on children as

a class . . . exhibit the settled understanding that the differentiating characteristics of youth are universal." J. D. B. v. North Carolina, 131 S. Ct. 2394, 2403-04 (2011). Although individuals vary, numerical age is a "rough but fair approximation of maturity and judgment." Hodgson, 497 U.S. at 483.

This Court should hold that the Rule 3.850 limitations period is tolled until age 18 in all cases to balance the State's finality interest against the appropriate level of protection for the rights of children. Using age eighteen as a dividing line is recognized as appropriate and fair, and would be much easier to administer than a case-by-case inquiry where age was only a factor in the tolling analysis.

a. Tolling the limitations period is consistent with judicial and legislative policies protecting minors.

Many statutes and legal doctrines reflect the recognition that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." Bellotti v. Baird, 443 U.S. 622, 635 (1979) (overturning parental consent law which lacked judicial bypass procedure) (cited in Jones v. State, 619 So. 2d 418, 421 (Fla. 5th DCA 1993) (rejecting challenge to statutory rape law)). Generally these laws recognize age 18 as the age of majority. See State v. J.P., 907 So. 2d 1101, 1131 (Fla. 2004) (discussing activities permitted by adults but not minors). Although children have rights, the state retains "authority to protect them

from the conduct of others or from their own inability to make wise decisions." Id. at 1123 (quotation omitted).

Like every state, Florida has an extensive network of statutes requiring juveniles to abstain from certain vices and defer certain decisions. See Lane v. MRA Holdings, LLC, 242 F. Supp. 2d 1205, 1217-18 (M.D. Fla. 2002) (listing approximately twenty-four statutory disabilities of nonage). Because the disability of nonage also is well established as a general matter at common law, Florida law provides for certain enumerated exceptions. Fla. Stat. § 743.01 *et seq.* The disability of nonage is removed for a minor adjudicated as an adult, but only "as such disability relates to health care services" and not including "abortion and sterilization." Fla. Stat. § 743.066. The adult conviction specifically does not remove the disability of nonage for other purposes, such as consent to sexual conduct. Campbell v. State, 771 So. 2d 1205 (Fla. 2d DCA 2001) (affirming adult conviction for unlawful sexual activity with DOC-incarcerated minor).

Courts have also guaranteed special procedural protection for the rights of minors, including appointment of counsel or a guardian when appropriate. E.g. Buckner v. Family Servs. of Cent. Fla., Inc., 876 So. 2d 1285, 1286-87 (Fla. 5th DCA 2004) (discussing importance of guardian ad litem serving as "'adult person of reasonable judgment and integrity" in "procedural protection of a minor's

welfare and interest by the court" (quotations omitted)). The appointment of counsel is an important procedural feature when a juvenile is not able to protect his own rights. In the course of overruling Florida's parental consent to abortion statute on state law grounds, the Florida Supreme Court observed that the judicial bypass mechanisms were ineffective because the law did not provide for the appointment of counsel:

> A minor, completely untrained in the law, needs legal advice to help her understand how to prepare her case, what papers to file, and how to appeal if necessary. Requiring an indigent minor to handle her case all alone is to risk deterring many minor from pursuing their rights because they are unable to understand how to navigate the complicated court system on their own or because they are too intimidated by the seeming complexity to try.

In re: T.W., 551 So. 2d 1186, 1196 (Fla. 1989) (quoting Indiana Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127, 1138 (7th Cir. 1983)). Florida law permits, but does not require, appointment of counsel for postconviction proceedings. Fla R. Crim. P. 3.111(b)(2). In any event, no counsel was appointed for Dorian.

Finally, age is considered an objective factor that must be taken into account when determining whether the waiver of a right was voluntary. This is such a basic, common-sense part of the analysis that the Supreme Court remarked that "officers and judges need no imaginative powers, knowledge of developmental

psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age." J. D. B. v. North Carolina, 131 S.Ct. 2394, 2407 (2011). The Supreme Court has consistently held that a child's age must be taken into account to ensure that evidence is not obtained as "the product of ignorance of rights or of adolescent fantasy, fright or despair." In re Gault, 387 U.S. 1, 55 (1967); see also J.D.B., 131 S. Ct. at 2403-03 (youth is a factor in the "in-custody" analysis); Gallegos v. Colorado, 370 U.S. 49, 54-55, 1212-13 (1962) (youth is factor in assessing voluntariness of confession).

Youth is widely recognized as an objective factor that requires special protection. Neither Rule 3.850 nor the interpreting case law explains how the Rule 3.850 limitations period applies to a minor defendant tried as an adult and incarcerated in a DOC facility. To pretend that minors can effectively discover their claims and raise them in a Rule 3.850 motion is to ignore reality. On the other hand, to toll the Rule 3.850 limitations period until age 18 is to implement an easy-to-administer rule that comports with our general consensus that adulthood begins at age 18 for most purposes.

b. Failing to toll the statue of limitations violates the right to access the courts.

Tolling the Rule 3.850 limitations until age 18 is consistent with wisdom and justice, and within the Court's power. Failing to toll the statute, on the other hand,

creates a serious risk of violating the Florida and federal constitutional guarantees of fair access to the courts.

For adults, the Constitution provides a right to access the courts through adequate law libraries or adequate legal assistance. Lewis v. Casey, 518 U.S. 343, 346 (1996); see also Johnson v. Avery, 393 U.S. 483, 487 (1969) (holding that prison regulation preventing inmate from obtaining help with federal habeas corpus was illegal; "in the absence of any other source of assistance for such prisoners," the regulation was functionally "a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions."); Wolff v. McDonnell, 418 U.S. 539, 577-80 (1974) (extending Johnson to civil cases). The law library option should not be uncritically applied to minors, because no regular law library can be adequate for the average minor. Gallegos, 370 U.S. at 54-55 (age must be taken into account during interrogation, to do otherwise "would, in effect, be to treat [the minor] as if he had no constitutional rights"). The idea of a treatise on postconviction remedies directed towards teens and written at a seventh grade level is absurd; in any event, no such resource exists. The inability to litigate effectively is a predictable result of Dorian's youth and personal characteristics, and no set of books could have given fourteen-year-old Dorian the ability to "determine what the law is in order to determine whether a colorable claim exists, and if so, what facts

are necessary to state a cause of action" within the two-year limitations period. Bounds v. Smith, 430 U.S. 817, 825 (1977). Here, access to legal materials is not relevant to the issue of access to the courts.

As for "adequate legal assistance," in this context nothing short of appointment of counsel would be "adequate" to ensure that Dorian's interests were protected. As our courts and legislatures recognize, the average youth is not competent to manage his own legal affairs without help. Incarcerated youth are even less able to protect their rights, both because their incarceration limits their access to resources and because of widely shared characteristics (e.g., alienation and low levels of discipline and literacy) that indicate greater inability to litigate their rights in a criminal court. There is no reason to believe that the youthful offender population at any given institution will include an inmate capable of providing meaningful assistance with legal work, and no indication that DOC provides youthful offenders with access to other legal help.

In addition to facing a lack of materials and assistance, youthful offenders might simply make an unwise, immature decision not to timely investigate or pursue their postconviction remedies. Even a child prodigy capable of determining his or her legal rights and presenting claims to the court might make an irrational decision not to investigate in the first place, due to immaturity or to outside

influence. As we all know, adolescents generally are "often susceptible to pressure from their peers towards conformity," Lee v. Weisman, 505 U.S. 577, 593-94 (1992). While this can be a positive quality around good influences, the DOC's population by definition is composed primarily of individuals with antisocial tendencies. Moreover, incarcerated youth are more subject to peer pressure because in prison strong social ties promote personal safety. Fear of appearing different or even of physical separation from the group (if the group were not also going to the law library) could lead juveniles to forego legal assistance available at an institution. Unless counsel is appointed to protect the postconviction rights of youthful offenders, one should expect them to routinely fail to timely bring meritorious claims, because children tend to make poor decisions. Under both Florida and United States law, the constitutional right of access to the courts should guarantee incarcerated youth the same opportunity to pursue meaningful postconviction challenges by beginning the statute of limitations at age eighteen.

2. The Circuit Court Erred by Denying a Hearing on Dorian's Entitlement to Tolling under Rule 3.050 of the Florida Rules of Criminal Procedure.

In the alternative, Dorian asks this Court to remand his case for a determination of whether the limitations period should be tolled due to Dorian's youth and other circumstances. Under Rule 3.850 and Rule 3.050, Dorian must

show both good cause and excusable neglect because the deadline has already passed. State v. Boyd, 846 So. 2d 458, 460 (Fla. 2003); Parker v. State, 907 So. 2d 694, 695 (Fla. 4th DCA 2005); see also Petit-Frere v. State, 108 So. 3d 681, 683 (Fla. 2d DCA 2013) (directing lower court to consider eligibility for extension). The record does not conclusively demonstrate that good cause and excusable neglect do not exist. Thus, the Circuit Court erred by failing to hold a hearing on the issue.

B. The Circuit Court erred in finding that Dorian's claims were barred because he did not raise them at trial or on appeal.

Trial counsel rendered ineffective assistance by failing to inform Dorian that he could raise his claims on appeal if trial counsel filed a motion to withdraw the plea. Griffin v. State, 820 So. 2d 906 (Fla. 2002). Trial counsel failed to advise Dorian about withdrawing the plea, about his right to appeal, and about his grounds for appeal. Additionally, Dorian's claims regarding Basic Training did not become ripe until after the Circuit Court rejected the DOC's recommendation, which occurred after the time for filing an appeal expired. Finally, as discussed in the following section, Dorian cannot now obtain a belated appeal to pursue his claims, due to the explicit four-year limitations period under Rule 9.141(c)(5). Under these circumstances, it would be unjust to enforce the rule against raising claims that could have been raised at trial or on direct appeal.

C. The Circuit Court erred in finding that Dorian should have filed a petition for a belated appeal.

Rule 9.141(c)(5) provides that "in no case shall a petition for belated appeal be filed more than 4 years after the expiration of time for filing the notice of appeal." More than four years had elapsed when Dorian filed his postconviction motion. Resort to Rule 9.141(c)(5) would have been futile, and this rationale should not be used to thwart tolling based on Dorian's youth.

D. The Circuit Court erred in determining that basic training claim was forfeited because Dorian did not seek relief from the Department of Corrections while incarcerated.

Certain types of claims, such as gain time calculations, must be raised with DOC, with judicial review only by way of mandamus. Hatchett v. State, 766 So. 2d 499, 500 (Fla. 5th DCA 2000). But "[i]nformal remedies need not be exhausted where they are inadequate or nonexistent, or where resort to them would be futile." Fla. High Sch. Athl. Ass'n v. Melbourne Cent. High School, 807 So. 2d 1281, 1289 (Fla. 5th DCA 2004). To the extent that the exhaustion requirement applies to basic training/shock incarceration claims (the undersigned finds no precedent so indicating), all of the factors in favor of tolling the Rule 3.850 statute of limitations also weigh in favor of excusing the exhaustion requirement. Youth and inexperience are adequate reasons for Dorian's failure to recognize that the DOC violated his rights and failure to seek any remedy while he was incarcerated.

Additionally, Dorian should be excused from his failure to exhaust because the DOC has promulgated regulations that do not incorporate the statutory mandate that "Failure to notify the department within 21 days shall be considered an approval by the sentencing court for placing the youthful offender in the basic training program." Fla. Stat. 958.045(2). Section 33-601.234 of the Florida Administrative Code provides:

> **(2)** . . . . If the sentencing court disapproves the [DOC]'s recommendation [to place the child into Basic Training], the classification officer shall notify the inmate of the sentencing court's decision and the inmate shall complete incarceration pursuant to the terms of the commitment order. If the sentencing court approves the recommendation, the classification officer will notify the inmate of assignment to the basic training program. The department shall contact the sentencing court within 21 days after receipt of the department's request to determine the status of the request for approval to participate in the basic training program. The inmate will be placed in the program after the sentencing court approves his or her placement for participation.

33-601.234, F.A.C. The regulations indicate that DOC requires an affirmative approval from the sentencing court even after the 21-day period to deny placement expires. Dorian could not have gotten relief under DOC's authoritative interpretation of the statute, which would have been applied to his request for shock incarceration. Thus, resort to administrative exhaustion would be futile.

Finally, Dorian is no longer in custody on the basic-training-eligible convictions and sentences. The DOC is not able to afford Dorian the benefit of basic training or otherwise correct the mistake. Candidly, Dorian's previous right to shock incarceration or any other modification of his prior custodial status is relevant primarily because his DOC custody status resulted in the Prison Releasee Reoffender enhancement in a subsequent conviction. In this case, mandamus is not appropriate judicial relief because an order prospectively compelling the DOC to take a certain action is not as adequate and complete as an order acknowledging that Dorian should have been placed into the basic training program. City of Coral Gables v. State ex rel. Worley, 44 So. 2d 298, 300 (Fla. 1950) (explaining that mandamus will not lie where another remedy would be adequate).

E. The Circuit Court Erred in holding that Dorian's claims are not cognizable in habeas corpus.

The prohibition on obtaining review of issues that could have been raised at trial or on direct appeal, or a second review of issues already raised, does not apply when a manifest injustice is present. Johnson v. State, 9 So. 3d 640, 641 (Fla. 4th DCA 2009); Moore v. State, 924 So. 2d 840, 841 (Fla. 4th DCA 2006). The Court should find that Dorian's claims present a manifest injustice because he was denied the benefit of his plea bargain when the Circuit Court denied basic training placement, and because of the importance of promoting procedural regularity in

juvenile cases. D.D.W. v. State, 686 So. 2d 747, 748 (Fla. 2d DCA 1997) (finding manifest injustice where juvenile was sentenced to level six facility despite clause in plea agreement specifying level four facility); see also In re: T.W., 551 So. 2d 1186, 1196 (Fla. 1989) (holding that Florida informed consent statute lacked adequate procedural safeguards for minors; trial judge was not required to memorialize reasons for denying waiver of consent, rendering appellate review "meaningless").

F. The Circuit Court Erred in holding that Dorian should have re-filed his habeas petition in Liberty County.

When Dorian filed the habeas petition, he was incarcerated in Orange County Jail. His subsequent transfer to Liberty County did not divest the Orange County Circuit Court of jurisdiction. Perkins v. State, 766 So. 2d 1173 (Fla. 5th DCA 2000). The Circuit Court erred in holding that Dorian's was filed in the wrong circuit.

G. The Circuit Court erred in determining that Dorian's sentences were not "illegal" for the purposes of Rule 3.800.

Rule 3.800(a) allows the courts "to correct sentencing errors that may be identified on the face of the record and, because such errors may be resolved as a matter of law, do not require contested evidentiary hearings." Williams v. State,

957 So. 2d 600, 603-04 (Fla. 2007). The Florida Supreme Court has observed that Rule 3.800 is not limited to sentences in excess of the statutory maximum:

> Rule 3.800(a) provides that a court may at any time correct a multitude of sentencing errors at any time the error is discovered . . . The policy underlying this rule includes concerns that a defendant not be subject to punishment or imprisonment beyond that which was lawfully imposed. Although the [lower court] suggests that corrections under the rule may be limited to sentences that are statutorily unfounded, the rule and our case law do not support such a limitation, since, for example, the rule itself allows correction for a calculation error or credit for time served.

Id. at 603-04. The Williams court concluded that "an error in recording the actual sentence pronounced in open court . . . may also be determined from an examination of the record." Id. at 604. The First District has recognized that juveniles may use Rule 3.800(a) to challenge their confinement in more restrictive high-risk facilities. D.H. v. State, 114. So. 3d 496 (Fla 1st DCA 2013) (finding that sentencing a juvenile to a high-risk facility was an illegal sentence where Florida statues authorized only incarceration in a low or medium-risk facility). Dorian submits that the fundamental errors in the transfer process are apparent from the record and should be cognizable in Rule 3.800(a) because they relate to the court's jurisdiction to impose an adult or youthful offender sentence. But see Stickles v. State, 579 So. 2d 878 (Fla. 2d DCA 1991) (challenges to juvenile

transfer procedure are not cognizable because they do not render the sentence "illegal" for Rule 3.800(a), even though such errors are "fundamental" for the purposes of preservation on direct appeal).

IV. CONCLUSION

For the reasons given in the body of this brief, Dorian Romero asks the Court to remand his case to the Circuit Court with instructions to grant his Rule 3.800 motion and *nunc pro tunc* sentence him to incarceration in a juvenile facility. Additionally, Dorian asks the Court to remand this case to the Circuit Court with instructions to consider the Rule 3.850 challenges to his convictions (and sentence, if the Court determines relief is not available under Rule 3.800) as timely filed and to order a response from the State. In the alternative, Dorian asks the Court to remand this case to the Circuit Court with instructions to hear his Petition for a Writ of Habeas Corpus on the merits.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2014, a true and correct copy of the foregoing has been furnished by email to the Attorney General's e-filing account at: crimappdab@myfloridalegal.com

CERTIFICATE OF COMPLIANCE

I certify that this Initial Brief of Appellant Dorian Romero complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l). The brief has been prepared using Times New Roman, 14-point font.

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